

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**

ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

July 11, 2008

---

In the Matter of Roland Couillard

OADR Docket No. WET-2008-035  
DEP File No. 065-0859  
Salisbury

---

**RECOMMENDED FINAL DECISION**

On April 17, 2008, Roland Couillard (the “Petitioner”) filed a notice of claim with the Office of Appeals and Dispute Resolution (“OADR”) challenging the denial by the Northeast Regional Office of the Massachusetts Department of Environmental Protection (“the Department”) of his request for a Superseding Order of Conditions (“SOC”) to build a single family home. The Department issued the denial on the grounds that the Petitioner’s request for the SOC was premature. Petitioner appealed to OADR contending that the Department erred as a matter of law in its dismissal of his request for an SOC. The Department and the Salisbury Conservation Commission, which is also a party to this matter, have indicated in their Pre-Screening Memoranda that they support the position that the appeal is untimely.

The Petitioner has filed a motion for summary decision and a remand to the Department’s regional office on the grounds that the appeal was a timely filed appeal. The Salisbury Conservation Commission (the “Commission”) has filed a motion for summary decision, in



which the Department concurs, asking that I dismiss the appeal on the grounds that it was prematurely filed and therefore not timely. The Petitioner argues that his February 20, 2008 appeal was a timely appeal of a failure to close the public hearing in a timely manner by the Commission, or, alternatively, that even if the appeal is considered a premature appeal of the Commission's denial of its order of conditions, the appeal still should have been accepted by the Department. I agree with the latter position, and I conclude that I do not need to reach the question of whether the Petitioner's appeal was a valid appeal of a failure to act on the part of the Commission.

### **Findings of Undisputed Fact**

In preparation for the filing of the motions, the parties stipulated to the record in this matter and presented their views of the undisputed facts that emerge from this record in their motions. From these documents, I find that the following facts are undisputed:

1. The Petitioner filed a Notice of Intent ("NOI") on December 4, 2007 with the Commission, and the first public hearing was held within the required twenty-one day period on December 19, 2007. The Petitioner appeared at and participated in this hearing. The Commission announced a continuance of the public hearing until January 16, 2008. Stipulation of the Record, Exhibits 1, 2 and 4.
2. The Petitioner appeared at and participated in the continued public hearing on January 16, 2008. The Commission asked the Petitioner to provide more information about utilities and proximity of the proposed house to neighboring houses and the lot lines. The Commission announced a continuance of the public hearing until February 6, 2008. Stipulation of the Record, Exhibit 5.
3. The Petitioner submitted materials in response to the Commission's request for more information at the February 6, 2008 public hearing. The Commission expressed distress about the timing of this submission because the members had wanted the information submitted at least a week prior to the hearing in order to give the members time to review it. The Commission asked the Petitioner for his consent to a

further continuance of the public hearing until February 20, 2008 to give them time to consider the new information. Stipulation of the Record, Exhibit 6.

4. Petitioner objected to the continuance and refused to give his consent. All parties agree that Petitioner refused to consent to a further continuance. Stipulation of the Record, Exhibit 6; see also Motions for Summary Decision by Petitioner and Commission.
5. All parties also agreed that the Commission did not close the public hearing but instead voted to continue the public hearing to February 20, 2008 despite the Petitioner's refusal to grant consent. Stipulation of the Record, Exhibit 6; see also Motions for Summary Decision by Petitioner and Commission.
6. On February 20, 2008, prior to the time of the rescheduled public hearing, Petitioner filed his request with the Department for a Superseding Order of Conditions on the grounds that the Commission illegally continued the public hearing when it should have voted to close the public hearing, thus failing to act in accordance with the Wetlands Regulations. Stipulation of the Record, Exhibit 9.
7. Later on February 20, 2008, the Commission reopened the public hearing on Petitioner's NOI, took additional evidence adverse to the proposed NOI from an abutter and voted to deny the Petitioner an order of conditions. Stipulation of the Record, Exhibit 7.
8. On February 22, 2008, within twenty-one days of the date of the February 6, 2008 public hearing, the Commission issued its denial of the Petitioner's request for an order of conditions. Stipulation of the Record, Exhibit 8.
9. On March 3, 2008, the Department issued a Site Inspection notice and did in fact conduct a site inspection on March 18, 2008. On April 3, 2008, the Department issued a dismissal of the appeal on the grounds that it was untimely filed. Stipulation of the Record, Exhibits 10 and 11.

I find from these undisputed facts that the Petitioner clearly gave consent to continuances of the public hearing until February 6, 2008. There is no requirement in the Wetlands Regulations that the applicant in a proceeding before a conservation commission must give written consent. There is no recorded statement in the minutes of the hearings or any

contemporaneous writing which documents any objection to the continuances of the public hearing until February 6, 2008. Instead, the record of the hearings and the record of submissions by the Petitioner show that he actively participated in the hearings up to and through the February 6, 2008 hearing. On the other hand, it is quite clear that the Petitioner objected to a further continuance of the public hearing on February 6, 2008 and that the Commission voted to continue the public hearing over Petitioner's objections and without his consent. Therefore, the Commission was required to issue its decision on the Petitioner's NOI filing on or before February 27, 2008.

### **Standard of Review**

A party seeking a summary decision must demonstrate that there is no genuine issue of material fact and that the party is entitled to a final decision as a matter of law. 310 CMR 1.01(11)(f); *see also* Matter of Town of Pelham Building Committee, Docket No. 98-054, Final Decision, at 11, 5 DEPR 127, 130 (August 14, 1998); Matter of Katherine Conroy, Requester, Docket No. 97-074, Final Decision, 5 DEPR 89, 90 (June 9, 1998); Matter of Burkhard Corp., Docket No. 98-086, Final Decision, 6 DEPR 136, (June 16, 1999). This standard mirrors the standard set forth in Rule 56 of the Massachusetts Rules of Civil Procedure. *See* Mass. R. Civ. P. Rule 56; *see* Matter of S. Bent & Brothers, Inc., Docket No. 87-27, Decision on Motions for Summary Decision and for a More Definite Statement, 6 MELR 1501, 1502 (August 9, 1988).<sup>1</sup>

---

<sup>1</sup> "The standard of review of a grant of summary judgment is whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117 (1991), citing Mass. R. Civ. P. 56 (c). An order granting summary judgment will be upheld only if it relies on undisputed material facts, and the moving party is entitled to judgment as a matter of law. Community Nat'l Bank v. Dawes, 369 Mass. 550, 556 (1976).

**Ruling on Failure to Act Claim**

The parties agree upon the basic facts relevant to the timeliness of the appeal on this matter; however, they do not agree upon some key facts and mixed issues of facts and law relevant to addressing the question of whether the Commission failed to act in accordance with the Wetlands Regulations. It is clear that the Commission failed to close the public hearing on February 6, 2008 when the Petitioner refused to consent to a further continuance. The Wetlands Regulations clearly require that applicants must consent to continuances of the public hearing that go beyond twenty-one (21) days of the date of filing of the NOI. See, 310 CMR 10.05(5)(b). Once an applicant withholds such consent, the Commission is obligated to close the public hearing and schedule a vote upon the applicant's filing. See, 310 CMR 10.05(5); see also Oyster Creek Preservation, Inc. v. Conservation Commission of Harwich, 449 Mass. 859, 874 N.E.2d 1104, 2007 Mass. LEXIS 720 (October 23, 2007) (Conservation commission cannot continue hearing after vote to close public hearing and must observe 21-day deadlines).

What complicates this case is that the Commission has up to twenty-one days in which to vote and issue its final decision upon an applicant's filing after the date on which the public hearing closed. See, 310 CMR 10.05(6). It is quite common for conservation commissions to close a public hearing on one date and then wait to deliberate and vote at its next meeting within twenty-one days of the closure of public hearing. The Commission in this case did vote and issue a decision within twenty-one days of the last legal public hearing, namely before February 27, 2008. However, the Commission also held a continued public hearing at which it took additional information and statements from an abutter opposed to the Petitioner's project. This conduct was clearly in violation of the requirements of 310 CMR 10.05(5), but it is not clear what the consequences of this noncompliance would be.

There are numerous issues of fact and mixed issues of fact and law in dispute as to the implications of the disputed facts. The parties dispute the consequences of the continued hearing on February 20, 2008 and whether it resulted in any prejudice to the Petitioner. The Commission disputes that the information from the abutter was truly evidence, because it did not base its denial upon that information. The Commission also says that Petitioner participated in the February 20<sup>th</sup> hearing because of statements made by Petitioner's consultant at the February 20, 2008 hearing. It is unclear from the record whether Petitioner's consultant just happened to be in attendance at the hearing, perhaps because he was there for some other client, or whether he had been directed by the Petitioner to represent Petitioner's interests if the matter should be taken up. The minutes of the February 20<sup>th</sup> meeting reflect that no one spoke up when the Commission asked if any official representative was present for Petitioner. Petitioner points out that he did not appear at the February 20, 2008 hearing because he considered it illegal and that the Commission was fully on notice that he considered it illegal by his appeal filing. There is also a dispute between the parties as to the degree to which the Petitioner was prejudiced by the Commission's error in holding a continued hearing after the deadline for closure of the hearing. This is also unclear from the record. Therefore, I conclude that there are genuine disputed issues of material fact on which I would need to conduct an adjudicatory hearing in order to determine whether the Petitioner does in fact have a valid claim of failure to act on the part of the Commission within the meaning of the Wetlands Regulations.

#### **Ruling on Timely Filing of Appeal**

I do conclude that the Petitioner filed a timely appeal with the Department's regional office of the Commission's denial of his request for an order of conditions and that there is no

genuine issue of material fact in dispute with respect to the timeliness of the appeal. Prematurity in the filing of administrative, as well as court appeals, is not necessarily jurisdictionally fatal. *See, Matter of Steven D. Peabody*, Docket No. 2002-053 (Wetlands) and Docket No. DEP-04-400 (Title 5), Final Decision (January 25, 2006); *Matter of James B. Ferguson*, Docket No. 93-014, Final Decision (August 4, 1993); *Becton, Dickson & Co. v. State Tax Commission*, 374 Mass. 230, 234 (1978). An appeal filed more than ten days after the issuance of a conservation commission decision is late and must be dismissed. *See*, 310 CMR 10.05(7)(c). However, there is no limit stated in the Wetlands Regulations for the earliest date of filing. Statutes and regulations that specify a deadline for the filing of an appeal should be interpreted to fix a “latest” but not an “earliest” date for filing. *See, Matter of Steven D. Peabody*, Docket No. 2002-053 (Wetlands) and Docket No. DEP-04-400 (Title 5), Final Decision (January 25, 2006) [appeal properly accepted when it was only one day early]; *Webster Thomas Co. v. Commonwealth*, 336 Mass. 130 (1957). The Supreme Judicial Court has ruled that “statutes embodying procedural requirements should be construed, when possible, to further the statutory scheme intended by the Legislature without creating snares for the unwary. [citations omitted].” *See, Becton, Dickson & Co. v. State Tax Commission*, 374 Mass. 230 (1978). This rule of construction should also be applied to regulations.<sup>2</sup>

The Commission spends a great deal of time arguing that all decided cases on this subject insist upon a requirement that the outcome of the decision had to be known by the Petitioner in order for a premature filing to be acceptable. I do not agree. None of the cases cited by the

---

<sup>2</sup> The Supreme Judicial Court has held, in the context of environmental as well as other areas of law, that the language of regulations as well as statutes should be interpreted in accordance with traditional rules of construction. *See, Hellman v. Board of Registration in Medicine*, 404 Mass. 800, 803 (1989); *Warcewicz v. Dep’t. of Environmental Protection*, 410 Mass. 548; 574 N.E.2d 364, 365-66 (1991).

Commission required that a premature appeal could only be accepted if the appellant had prior knowledge of the outcome. The inquiry in these cases was twofold: (1) whether the controversy underlying the appeal is sufficiently ripe for review so that the authority receiving the appeal can provide relief; and (2) whether any prejudice results to any party from the acceptance of an early appeal. *See, Becton, Dickson & Co. v. State Tax Commission*, 374 Mass. 230, 234 (1978) (Taxpayer appeal, although filed before formal tax assessment issued, was filed after agency had made a decision at hearing; no prejudice to agency or goals of its administrative procedures was found); *Webster Thomas Co. v. Commonwealth*, 336 Mass. 130 (1957) (Claim for damages accepted, although filed a few months before claim vested, because the controversy was ripe and there was no prejudice to defendant).<sup>3</sup> Certainly, knowledge of the outcome by an appellant is one indicia that an appeal is ripe for review, but it is not the only such indicia. Having a decision issue within a matter of days after the filing of Petitioner's appeal also indicates that there is a final decision subject to review and a controversy that can be resolved.

In addition, there is no prejudice to the Commission or the Department from early acceptance of Petitioner's appeal. There is no interference with local review, which was complete by the time the Department took up the matter in March. Contrary to the arguments made by the Commission in their brief, the appellant did not file the appeal so early that it resulted in any sidestepping of the local review required by the regulations. *See, e.g., Matter of Hanson Water Department*, Docket No. 95-047, Final Decision – Order of Dismissal (July 18, 1995) (Petitioner's attempt to appeal a letter issued by the Department as part of its superseding

---

<sup>3</sup> In the *Webster Thomas* decision, the Supreme Judicial Court recognized that "ordinarily an action at law may not be maintained if at the time it is commenced there is not in existence a complete cause of action," but found instead that early filings could be accepted where the issues in controversy were fully developed and the defendant was not prejudiced by the early filing. *See, Webster Thomas* at 132.



review process under the Wetlands Regulations was premature; case was dismissed and remanded back to the regional office). Within two days of the filing of Petitioner's request for a superseding order, there was a final decision by the Commission, which the Department had the jurisdiction to resolve through its superseding review authority. The Department should not have dismissed the appeal. *See, Matter of Elizabeth Haddad*, Docket No. 98-028, Ruling on Motion to Dismiss (November 5, 1998) (Refusal to dismiss appeal as prematurely filed where petitioner appealed determination of applicability but failed to appeal amended determination of applicability issued ten days later; dismissing appeal would elevate form over substance).

As to Petitioner's interests, the dismissal of Petitioner's appeal has resulted in serious prejudice to Petitioner's rights to have a review and decision by the Department as to whether his project proposal complies with the Wetlands Protection Act and the Wetlands Regulations. Premature appeals can be accepted to protect against the loss of a valuable right. *See, e.g., Matter of Elizabeth Haddad*, Docket No. 98-028, Ruling on Motion to Dismiss (November 5, 1998); *Becton, Dickson*, 374 Mass. at 234 (1978).

Because I find that the Department erred in rejecting Petitioner's appeal as untimely filed, I need not reach the question of whether the Petitioner also filed a valid appeal on the grounds that the Commission failed to act in violation of the Wetlands Regulations in a manner which would give rise to a 310 CMR 10.05(7)(b)(4) appeal claim. The dismissal of Petitioner's request for a superseding order by the regional office of the Department was made on jurisdictional grounds. Upon a finding that the Department did indeed have jurisdiction, the appropriate remedy is a remand to the regional office for a review of the merits of the Petitioner's filing.

*See, Matter of Town of Hull, Docket No. 90-168, Final Decision, 2 DEPR 160 (July 26, 1995);  
Matter of Duxbury Beach Reservation, Inc., Docket No. 91-135, Final Decision (July 9, 1992).*

For all these reasons, I recommend that summary decision be entered in favor of the Petitioner and that this matter be remanded to the Northeast Regional Office of the Department for a substantive review under the Wetlands Protection Act and the Wetlands Regulations of the Petitioner's proposed project as set forth in his NOI, as supplemented with any other additional information that the Petitioner may wish to submit or that the Department may chose to request from Petitioner.

**NOTICE- RECOMMENDED FINAL DECISION**

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

This final document copy is being provided to you electronically by the  
Department of Environmental Protection. A signed copy of this document  
is on file at the DEP office listed on the letterhead.

---

Laurel A. Mackay  
Presiding Officer

**SERVICE LIST**

**Petitioner:**

Roland Couillard  
3 Merrimac Street  
Seabrook, NH 03874

**Legal representative:** Matthew Watsky, Esq.  
Eastbrook Executive Park  
30 Eastbrook Road, Suite 301  
Dedham, MA 02026  
[watshky@worldnet.att.net](mailto:watshky@worldnet.att.net)

**The Local Conservation Commission:**

Salisbury Conservation Commission  
Salisbury Town Hall  
5 Beach Road  
Salisbury, MA 01952  
ATTN: Michelle Rowden  
[conservation@salisburyma.gov](mailto:conservation@salisburyma.gov)

**Legal representative:** Robert McKertich  
101 Arch Street  
Boston, MA 02110  
[rmckertich@k-plaw.com](mailto:rmckertich@k-plaw.com)

**The Department:**

Jill Provencal  
MassDEP/Northeast Regional Office  
Bureau of Resource Protection  
205B Lowell Street  
Wilmington, Massachusetts 01887  
[Jill.Provencal@state.ma.us](mailto:Jill.Provencal@state.ma.us)

Gail McCarthy, Esq.  
MassDEP/Office of General Counsel  
One Winter Street  
Boston, Massachusetts 02108  
[Gail.McCarthy@state.ma.us](mailto:Gail.McCarthy@state.ma.us)